IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

HAROLD HILL CLARK,
Appellant.

No. 2 CA-CR 2014-0041
Filed December 30, 2014

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County
No. CR20132493001
The Honorable Howard Fell, Judge Pro Tempore

AFFIRMED

COUNSEL

Thomas C. Horne, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Alan L. Amann, Assistant Attorney General, Tucson

and

Barbara LaWall, Pima County Attorney
By Heather A. Mosher, Deputy County Attorney, Tucson
Counsel for Appellee

Lori J. Lefferts, Pima County Public Defender
By David J. Euchner, Assistant Public Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Miller authored the decision of the Court, in which Judge Espinosa specially concurred and Chief Judge Eckerstrom dissented from the result.

M I L L E R, Presiding Judge:

¶1 Harold Clark appeals from the superior court's ruling affirming the justice court's judgment and sentence against him for driving while impaired to the slightest degree (DUI). Clark presents a facial challenge to the constitutionality of A.R.S. § 28-1388(D), which allows an arrestee's refusal to consent to a blood alcohol test to be used against him in a later proceeding. For the reasons set forth below, we affirm.

Factual and Procedural Background

¶2 The pertinent facts are undisputed. In July 2011, Clark was arrested for driving under the influence of alcohol. After the arrest, an officer requested consent to draw Clark's blood, but he refused. The officer obtained a warrant and Clark cooperated with the blood draw. Clark was charged with driving while impaired to the slightest degree and driving with a blood alcohol content (BAC) of .08 or more. Before trial, Clark filed a motion in limine to preclude admission of his refusal to submit to the blood draw. The court denied the motion and the arresting officer testified at trial about Clark's refusal.

¶3 Clark appealed his conviction[1] to the superior court, arguing that § 28-1388(D) was facially unconstitutional; further, that his right to counsel and an independent chemical test were hindered. The superior court affirmed the conviction and sentence. Clark timely appealed to this court pursuant to A.R.S. § 22-375.[2]

Due Process

¶4 Clark's challenge[3] to the facial validity of § 28-1388(D) is subject to de novo review. *See State v. Boehler*, 228 Ariz. 33, ¶ 4, 262 P.3d 637, 639 (App. 2011). This review is limited to whether the law itself is constitutional. *See Lisa K. v. Ariz. Dept. of Econ. Sec.*, 230 Ariz. 173, ¶ 7, 281 P.3d 1041, 1045 (App. 2012) (review does not include specific application to defendant). The court presumes that "the legislature acts constitutionally." *Gallardo v. State*, 691 Ariz. Adv. Rep. 36, ¶ 9 (Oct. 30, 2014), *quoting Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 220 Ariz. 587, ¶ 21, 208 P.3d 676, 684 (2009). Further, there must be "no circumstances [that] exist under which the challenged statute would be found valid." *Lisa K.*, 230 Ariz. 173, ¶ 8, 281 P.3d at 1045.

¶5 Arizona's implied consent law generally requires a person who operates a vehicle in this state to consent to alcohol or

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[1]The jury foreperson wrote "hung jury" on the verdict form for driving with a blood alcohol content of .08.

[2]A party contesting the constitutionality of a statute must serve the Attorney General, the Speaker of the House of Representatives, and the President of the Senate. *See DeVries v. State*, 219 Ariz. 314, ¶ 1, 198 P.3d 580, 582 (App. 2008). Although notice was not filed, we conclude no harm resulted in view of our disposition of this appeal. *Cf.* A.R.S. § 12-1841(C) (if notice not served and statute held unconstitutional, court shall vacate and give Attorney General, Speaker of the House of Representatives and President of the Senate opportunity to be heard).

[3] For the reasons stated by Judge Eckerstrom regarding harmless error, I agree that it is necessary to address Clark's argument.

drug tests if arrested for driving under the influence of those substances. *See* A.R.S. § 28-1321; *Caretto v. Ariz. Dep't of Transp.*, 192 Ariz. 297, ¶ 19, 965 P.2d 31, 36 (App. 1998) (consent statutes reflect multiple means to deter drunk driving). Certain specific requirements for blood draws and breath tests are further detailed in A.R.S. § 28-1388. Subsection D provides:

> If a person under arrest refuses to submit to a test or tests under § 28-1321, whether or not a sample was collected pursuant to subsection E of this section or a search warrant, evidence of refusal is admissible in any civil or criminal action or other proceeding. The issue of refusal is an issue of fact to be determined by the trier of fact in all cases.

Clark challenges only the admissibility provision, arguing that a refusal to submit to a blood draw before a search warrant is obtained implicates the protections of the Fourth Amendment to the United States Constitution. Further, assuming that his assertion of those constitutional rights cannot be used against him in a criminal proceeding, he contends that the statute violates his due process rights under the Fifth and Fourteenth Amendments.

¶6 To address Clark's argument, it is instructive to begin with a brief review of three United States Supreme Court cases addressing warrantless blood draws. In *Schmerber v. California*, 384 U.S. 757, 758-59 (1966), the court upheld the admission at trial of the results of the defendant's blood alcohol test, which had been conducted on blood drawn by a doctor while the defendant was in a hospital for treatment of injuries suffered in a car accident. The court concluded that (1) admission of the test results did not violate his Fifth Amendment privilege against self-incrimination because they were neither testimonial nor communicative and (2) although the Fourth Amendment ordinarily requires a warrant for a blood draw, the natural dissipation of alcohol in blood can invoke the emergency exception to the warrant requirement. *Id.* at 760-65, 770-72. The *Schmerber* court did not address the admissibility of refusal to submit to a blood test.

¶7 Admissibility of refusal was first considered by the court in *South Dakota v. Neville*, 459 U.S. 553 (1983). In that case, the court held that admission of a defendant's refusal to submit to a blood draw—as allowed by the South Dakota's implied consent statute—did not violate his Fifth Amendment privilege against self-incrimination because there was no coercion in making a suspect choose between refusal or submission. *Id.* at 554-56, 562. Further, the court concluded it was not "fundamentally unfair" to use the refusal as evidence of guilt even though the defendant had not been warned his refusal could be used against him at trial, in part because his right to refuse the blood alcohol test was not grounded in the Constitution, but "simply a matter of grace bestowed by the South Dakota legislature." *Id.* at 565.

¶8 The court revisited the warrantless blood draw in *Missouri v. McNeely*, ___ U.S. ___, ___, 133 S. Ct. 1552, 1563 (2013), holding that the dissipation of alcohol in blood over time was not a per se exigency justifying a blood test without a warrant. The court concluded the proper approach for determining whether there were exigent circumstances would be based on a totality of the circumstances. *Id.* In so holding, the court reiterated that the Fourth Amendment applied to blood draws conducted pursuant to implied consent statutes, and that police officers must obtain warrants when reasonable. *Id.* at 1562.

¶9 The *McNeely* court did not consider the constitutionality of using the defendant's refusal against him in a later case, but a plurality of the justices observed that states "have a broad range of legal tools to enforce their drunk-driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws." *Id.* at 1566. The plurality observed, citing *Neville*, that all fifty states have implied consent laws that impose consequences when a person "withdraws consent," such as license revocation or use of the refusal as evidence in a subsequent criminal prosecution. *Id.* Importantly, the plurality affirmed *Neville*'s holding that "the use of such an adverse inference does not violate the Fifth Amendment right against self-incrimination." *Id.*

¶10 Clark seeks to avoid the clear holdings of *Neville* and the statements by the plurality in *McNeely* by grounding his

argument in the Fourth Amendment. He provides no direct authority for this distinction and there is no reason to conclude that the result is different whether the objection is based on the Fourth or Fifth Amendments. It is undisputed that "a person suspected of drunk driving has no constitutional right to refuse to take a blood-alcohol test." *Neville*, 459 U.S. at 560 n.10, 565. Moreover, the *Neville* court distinguished *Miranda*[4] warnings, which contain an implicit assurance that a defendant's "silence will not be used against him." *Id.* at 565. The warnings in an implied consent law contain no such assurances and, to the contrary, make "it clear that refusing the test was not a 'safe harbor,' free of adverse consequences." *Id.* at 566. Finally, where there is no right to refuse a blood draw, there is no implicit right to preclude admission of the refusal in the criminal proceeding.

¶11 Clark also relies on *State v. Butler*, 232 Ariz. 84, ¶ 10, 302 P.3d 609, 612 (2013), for his Fourth Amendment argument. In *Butler*, the court relied on *McNeely* to conclude that "a compelled blood draw, even when administered pursuant to § 28-1321, is a search subject to the Fourth Amendment's constraints." 232 Ariz. 84, ¶ 10, 302 P.3d at 612. *Butler* focused on the voluntariness of consent given at the time of the blood draw rather than the "implied consent" given at the time a person drives. *Id.* ¶ 18. It found unconvincing the state's argument that consent is given at the time a person drives, and that the "consent" at the time of the testing is merely submission to the already-consented-to test. *Id.* ¶ 17. The court concluded that the Fourth Amendment requires consent to be voluntary. *Id.*

¶12 *Butler*, however, did not directly address whether an arrestee's refusal could be used against him or her in a later proceeding. Further, the *Butler* court distinguished, but did not overrule, *Carrillo v. Houser*, 224 Ariz. 463, ¶¶ 10-12, 232 P.3d 1245, 1247 (2010), an earlier Arizona Supreme Court case in which the court interpreted the implied consent portion of the statute as disclaiming any asserted right to refuse testing. Nor did *Butler* address earlier Arizona cases in which courts have found no right to

[4]*Miranda v. Arizona*, 384 U.S. 436 (1966).

refuse, and that the evidence of refusal is admissible. *See State ex rel. Verburg v. Jones*, 211 Ariz. 413, ¶ 6, 121 P.3d 1283, 1285 (App. 2005); *State v. Thornton*, 172 Ariz. 449, 452, 837 P.2d 1184, 1187 (App. 1992). *Butler* cannot be extended to preclude admission of refusal to consent.

¶13 Even if *McNeely* and *Butler* provided an express right to refuse a warrantless blood draw pursuant to an implied consent statute, Clark's due process argument fails because he cannot demonstrate there are no circumstances under which the statute would be constitutional. *See Lisa K.*, 230 Ariz. 173, ¶ 8, 281 P.3d at 1045. Clark relies primarily on *State v. Palenkas*, 188 Ariz. 201, 933 P.2d 1269 (App. 1996), and *State v. Stevens*, 228 Ariz. 411, 267 P.3d 1203 (App. 2012), to argue that a defendant's refusal of a warrantless search cannot be used as substantive evidence of guilt. In both cases, prosecutors elicited evidence of a defendant's refusal to allow the warrantless search of a residence and then commented on that evidence, indicating the defendant refused because he or she had something to hide. *Stevens*, 228 Ariz. 411, ¶ 4, 267 P.3d at 1205-06; *Palenkas*, 188 Ariz. at 205-08, 933 P.2d at 1273-76. Those cases hold that the admission of evidence and the prosecutor's comments violated the defendant's due process right to a fair trial because the refusal was used as substantive evidence of the defendant's guilt. *Stevens*, 228 Ariz. 411, ¶ 16, 267 P.3d at 1209; *Palenkas*, 188 Ariz. at 212, 933 P.2d at 1280.

¶14 But *Palenkas* and *Stevens* do not hold that such evidence is never admissible; rather, the court in *Stevens* recognized there were some sets of facts under which refusal would be admissible.[5] *Stevens*, 228 Ariz. 411, n.7, 267 P.3d at 1209 n.7. Even assuming without deciding that *Palenkas* and *Stevens* apply, refusal evidence may be admissible to respond to a claim by the defendant regarding, for example, police misconduct. The express language of the statute does not require the evidence to be submitted as substantive evidence of guilt. The statute only states the refusal is admissible,

[5]The court in *Stevens* noted that such evidence would still be admissible to respond to an argument by the defendant. 228 Ariz. 411, n.7, 267 P.3d at 1209 n.7.

and does not provide for prosecutorial comment on guilt. A.R.S. § 28-1388(D). Therefore, even assuming *Palenkas* and *Stevens* apply, Clark has not demonstrated the statute is unconstitutional because there are circumstances in which admission of the evidence would not violate the holdings in those cases.

Separation of Powers

¶15 Clark next argues § 28-1388(D) violates the separation of powers doctrine of the Arizona Constitution because it interferes with the judiciary's rulemaking authority. If possible, the court will construe a statute so that it is constitutional. *Readenour v. Marion Power Shovel*, 149 Ariz. 442, 445, 719 P.2d 1058, 1061 (1986). The Arizona Constitution generally reserves to our Supreme Court the power to make procedural rules, such as rules of evidence. *Seisinger v. Seibel*, 220 Ariz. 85, ¶ 7, 203 P.3d 483, 486 (2009); *see also* Ariz. Const. art. 6, § 5(5). Evidentiary statutes are not necessarily unconstitutional because we recognize "'reasonable and workable'" statutes that supplement the Arizona Rules of Evidence. *Seisinger*, 220 Ariz. 85, ¶ 8, 203 P.3d at 486-87, *quoting State ex rel. Collins v. Seidel*, 142 Ariz. 587, 591, 691 P.2d 678, 682 (1984).

¶16 Clark contends the statute conflicts with or engulfs Rules 401, 402, and 403 of the Arizona Rules of Evidence by making all refusal evidence admissible, bypassing any court consideration of whether the evidence is relevant or more prejudicial than probative. But the statute is not a strict mandate. Our supreme court, in construing an earlier version of the statute that stated that such evidence "shall be admissible," concluded that it did not preclude trial judges from deciding "preliminary questions concerning the admissibility of evidence or its sufficiency to go to the jury." *State v. Superior Court (Hays)*, 155 Ariz. 408, 411-12, 747 P.2d 569, 572-73 (1987). There is no reason to conclude "is admissible" in the extant statute to be stricter than the earlier version. Rather, it states that such evidence is generally admissible in a future proceeding, but does not prevent courts from making relevance, reliability, or other determinations. *See Matter of One (1) Rolex Brand Man's Watch*, 176 Ariz. 294, 299, 860 P.2d 1347, 1352 (1993) (construing forfeiture statute stating court "shall receive and consider" hearsay evidence as not precluding court from rejecting unreliable hearsay).

¶17 Clark also relies on a statement in *State v. Superior Court (Ahrens)*, 154 Ariz. 574, 744 P.2d 675 (1987), that the same language in a predecessor consent statute exceeded the authority of the legislature if it conflicted with the rules of evidence. *Id.* at 576, 744 P.2d at 677. The court concluded that *Neville* resolved the question in favor of admissibility. *Id.* at 578, 744 P.2d at 679. Despite the brief mention of separation of powers, the court never considered the statute in relation to any rules of evidence, instead limiting the discussion to the Fifth Amendment. *Id.* More important, in a subsequent decision, the court addressed separation of powers and found that trial courts had the power to make preliminary admissibility decisions. *Hays*, 155 Ariz. at 411-12, 747 P.2d at 572-73. The single statement in *Ahrens* is insufficient to support the unqualified proposition that a statute is void if it conflicts with the rules of evidence.

Disposition

¶18 Clark's conviction and sentence are affirmed.

E S P I N O S A, Judge, specially concurring:

¶19 I concur in the result but write separately because there is no need to address the constitutional challenge raised in this case. Clark was not prejudiced by the operation of the statute, and prudent appellate policy dictates that courts refrain from resolving constitutional issues unless absolutely necessary.

¶20 It is clear, even assuming arguendo that the admission at trial of evidence of Clark's refusal violated a constitutional right under the Fourth Amendment, it would have had no impact on the jury's verdict given the factual circumstances of this case. There simply was overwhelming evidence that Clark was driving while impaired "to the slightest degree." A.R.S. § 28-1381(A)(1). Clark's vehicle was traveling fifteen miles per hour below the speed limit and he took "an unusually long" time to pull over after the arresting officer had turned on his overhead emergency lights. Upon opening Clark's car door, the officer smelled the odor of alcohol and saw on the passenger seat two unopened beer cans in a plastic wrap that had originally contained four cans. Clark's speech was slurred and

unnecessarily loud, and his breath smelled of alcohol. He also had bloodshot, watery eyes. As Clark walked toward the officer, his gait was uneven and he staggered. And when administered a horizontal gaze nystagmus test, Clark showed six of six cues. He also failed two other field sobriety tests and tested positive for alcohol pursuant to a preliminary breath test. A later blood draw analysis revealed a BAC of .127. *See* § 28-1381(G)(3) (individual with BAC of .08 or more presumed under influence of intoxicant).

¶21 The unrefuted facts clearly mandated the jury's verdict on the § 28-1381(A)(1) charge. That Clark was belligerent and unwilling to cooperate with the blood draw was irrelevant. And the jury's not reaching a decision on the § 28-1381(A)(2) charge simply attests to a jury's ability to render compromise verdicts, *see State v. Lewis*, 222 Ariz. 321, ¶ 10, 214 P.3d 409, 413 (App. 2009) (acknowledging possibility of compromise verdict), or, possibly one or more jurors accepted Clark's argument that the state's blood test result was not proven valid beyond a reasonable doubt. But that would be of little consequence to the present issue because there was still abundant evidence without the BAC result. Under any scenario, the evidence of Clark's "slightest impairment" while driving was overwhelming. *See State v. Morales*, 198 Ariz. 372, ¶ 5, 10 P.3d 630, 632 (App. 2000) (jury need only find defendant who was driving "impaired to the slightest degree by alcohol").[6]

¶22 And it cannot reasonably be maintained that Clark was prejudiced by evidence of his refusal. It was only briefly brought out during trial testimony, and in his closing argument the prosecutor made no mention of it. He referred only to Clark's mood swings and use of profanity, and solely as indicators of impairment. Contrary to my dissenting colleague's contention, the brief references to Clark's refusal during testimony, with no emphasis or "claim[s]" by the prosecutor, could hardly have been "pivotal" to

[6]Although the state did not argue any error was harmless, we may consider waived arguments, *State v. Aleman*, 210 Ariz. 232, ¶ 24, 109 P.3d 571, 579 (App. 2005), and may affirm the trial court if correct for any reason, *State v. Canez*, 202 Ariz. 133, ¶ 51, 42 P.3d 564, 582 (2002).

the jury's determination that Clark was impaired while driving. Absent a closer case and the state dwelling on or highlighting Clark's refusal, it simply was a minor aspect of the overall encounter and could not have influenced a reasonable jury in the face of the plain evidence of his impairment. Additionally, the jury was instructed that Clark's refusal did not prove guilt or guilty state of mind.

¶23 Finally, although this appeal arises under A.R.S. § 22-375 as a facial challenge to A.R.S. § 28-1388(D), because the defendant was not prejudiced, he lacks standing to pursue his constitutional claim, and we therefore should decline to resolve it or entertain the appeal. "'Generally only those who are injured by an unconstitutional statute may object to its constitutionality.'" *State v. Delk*, 153 Ariz. 70, 71, 734 P.2d 612, 613 (App. 1986), *quoting State v. Burns*, 121 Ariz. 471, 473, 591 P.2d 563, 565 (App. 1979). *See also Biggs v. Cooper*, 234 Ariz. 515, ¶ 18, 323 P.3d 1166 (App. 2014) (standing to challenge constitutionality of statute requires "a distinct and palpable injury"), *quoting Sears v. Hull*, 192 Ariz. 65, ¶ 16, 961 P.2d 1013, 1017 (1998). Here, Clark "has not been injured or suffered any harmful effect." *Id*. It is well-established that prudent judicial policy "motivates us to avoid addressing constitutional issues unless absolutely necessary to resolve a case." *LaFaro v. Cahill*, 203 Ariz. 482, ¶ 16, 56 P.3d 56, 60 (App. 2002); *see Goodman v. Samaritan Health Sys.*, 195 Ariz. 502, ¶ 11, 990 P.2d 1061, 1064 (App. 1999) ("It is sound judicial policy to avoid deciding a case on constitutional grounds if there are nonconstitutional grounds dispositive of the case."). Accordingly, Clark having suffered no substantial prejudice or constitutional injury, his appeal should be summarily denied or dismissed and his conviction left standing.

E C K E R S T R O M, Chief Judge, dissenting from the result:

¶24 Both the Arizona Supreme Court and the United States Supreme Court have recently held that a compelled blood draw, even when administered pursuant to a state's implied consent law, "is a search subject to the Fourth Amendment's constraints." *State v. Butler*, 232 Ariz. 84, ¶ 10, 302 P.3d 609, 612 (2013); *accord Missouri v. McNeely*, ___ U.S. ___, ___, 133 S. Ct. 1552, 1561 (2013). "'Such an invasion of bodily integrity implicates an individual's most

personal and deep-rooted expectations of privacy.'" *Butler*, 232 Ariz. 84, ¶ 10, 302 P.3d at 612, *quoting McNeely*, ___ U.S. at ___, 133 S. Ct. at 1558.

¶25 Here, Clark refused to consent to such an invasion and asserted his right to insist that the state secure a warrant before drawing his blood. The state presented that refusal as substantive evidence of guilt. Arizona courts have long and repeatedly held that the state violates a defendant's Fourteenth Amendment right to due process by presenting a defendant's invocation of Fourth Amendment rights as direct evidence of guilt. *State v. Stevens*, 228 Ariz. 411, ¶ 16, 267 P.3d 1203, 1209 (App. 2012); *State v. Palenkas*, 188 Ariz. 201, 212, 933 P.2d 1269, 1280 (App. 1996); *see also State v. Wilson*, 185 Ariz. 254, 258, 914 P.2d 1346, 1350 (App. 1996) (stating in dicta it "is . . . generally impermissible to use a defendant's invocation of Fourth Amendment protections against him").[7] In so holding, we reasoned, "If the Fourth Amendment is to provide rigorous protection against unlawful searches, [people] must not be dissuaded from exercising the right for fear of incurring a penalty in any subsequent criminal prosecution." *Stevens*, 228 Ariz. 411, ¶ 15, 267 P.3d at 1209; *see also Palenkas*, 188 Ariz. at 211-12, 933 P.2d at 1279-80 (suggesting motives of one invoking right are ambiguous and do not clearly demonstrate knowledge of guilt).

¶26 A straightforward application of these precedents controls the result here. Clark possessed a Fourth Amendment right to refuse to consent to an invasion of his bodily integrity in the absence of a search warrant. He did so. The state presented that refusal as substantive evidence of his guilt, relying on A.R.S. § 28-1388(D). Indeed, that statute expressly purports to command such a result. *See id.* ("[E]vidence of refusal is admissible in any civil or criminal action or other proceeding . . . [and] refusal is an issue of fact to be determined by the trier of fact in all cases.").

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[7]Arizona courts are not unique in so holding. Indeed, this appears to be the majority rule. *See People v. Pollard*, 307 P.3d 1124, ¶ 28 (Colo. App. 2013) (collecting cases and observing that courts appear to "uniformly hold" such evidence inadmissible as substantive evidence of guilt).

Under *Stevens* and *Palenkas,* that statutory command, as enforced by the trial court, violated Clark's due process right to a fair trial under the Fourteenth Amendment.

¶27 The state maintains the existence of the implied consent law should alter our application of these principles in the DUI context, given that Clark impliedly consented to a blood draw, under the terms of A.R.S. § 28-1321(A), by driving. But our supreme court has recently made clear that a defendant's "implied consent" to a blood test under state law does not affect the protections enjoyed by a defendant under the Fourth Amendment. *See Butler*, 232 Ariz. 84, ¶¶ 9-10, 302 P.3d at 612 (holding Fourth Amendment constraints on state conduct remain intact notwithstanding state's invocation of implied consent law). Our high court specifically held that the voluntariness of consent to a blood draw is evaluated by traditional Fourth Amendment standards, independently of § 28-1321. *Butler*, 232 Ariz. 84, ¶ 18, 302 P.3d at 613. The necessary implication of this holding—that Arizona's implied consent law does not alter or diminish a defendant's Fourth Amendment right to refuse consent to a blood draw—requires us to reject the state's suggestion to the contrary. *See State v. Rosengren*, 199 Ariz. 112, ¶ 26, 14 P.3d 303, 311 (App. 2000) (court of appeals "may not disregard or deviate from controlling decisions of our supreme court").

¶28 My colleague Judge Miller maintains that we should instead be bound by an oblique comment in *McNeely.* Therein, a plurality of United States Supreme Court justices observed that many states with implied consent laws allow the use of refusal evidence in subsequent criminal prosecutions. ___ U.S. at ___, 133 S. Ct. at 1566. But the plurality was not purporting to address the precise question here—whether the Fourth Amendment prohibits the use of such refusal evidence, an issue neither before the Court nor disputed by the parties in *McNeely*. To the extent the plurality's observation contains any legal reasoning at all, its citation of *South Dakota v. Neville*, 459 U.S. 553 (1983), suggests that the *McNeely* plurality considered the admissibility of such evidence under only the Fifth Amendment. Notably, *Neville* exclusively addressed whether the Fifth Amendment's Self-Incrimination Clause

precluded use of refusal evidence at trial, 459 U.S. at 554, and it resolved that issue with reasoning pertinent only to Fifth Amendment analysis. *Id.* at 562-64. Ultimately, the Court emphasized the purpose of the Fifth Amendment in prohibiting the state from compelling testimony and therefore concluded implied consent laws did not run afoul of that amendment in establishing negative consequences for a refusal. *Id.* In the absence of any reasoning from the United States Supreme Court providing meaningful guidance on the Fourth Amendment question we face here, we must follow the clear holdings of our own state's jurisprudence. That jurisprudence has, in my view, squarely resolved the issues before us.

¶29 The state maintains that Clark's claim must fail because there are some scenarios wherein refusal evidence would be permissible under our precedents. It reasons, therefore, that because there are circumstances in which admission of refusal evidence does not violate due process, § 28-1388(D) should not be held unconstitutional. But the language of that statute broadly proclaims that "evidence of refusal is admissible in any . . . criminal action." It further states that the question of whether refusal occurred is always a factual question for the jury. *See id.* ("The issue of refusal is an issue of fact to be determined by the trier of fact in all cases."). But, as discussed, under our state's controlling precedent, such evidence is inadmissible when used as "direct evidence of guilt," *Stevens*, 228 Ariz. 411, ¶ 16, 267 P.3d at 1209, and admissible under only uncommon circumstances usually invited by the defendant's case. *See id.* n.7 (indicating assertion of Fourth Amendment right could be brought as evidence for impeachment purposes as "'fair response to a claim by the defendant'" or for other purpose that does not unfairly penalize exercise of right), *quoting United States v. Dozal,* 173 F.3d 787, 794 (10th Cir. 1999). In essence, then, the state asks us to read § 28-1388(D) as nothing more than a legislative exhortation that courts comply with existing Arizona evidentiary law. But such a reading of that statute would render it a nullity. I would instead read § 28-1388(D) for its obvious purpose: to discourage defendants from exercising their right to refuse a warrantless search. Because that core purpose in the

context of blood draws is constitutionally prohibited, I would find § 28-1388(D) unconstitutional on its face.

¶30 Lastly, I cannot agree with my other concurring colleague Judge Espinosa that we need not reach the constitutional question because any error would be harmless. My colleague correctly observes that the state presented a strong case that Clark was impaired to the slightest degree. However, I cannot agree that the state's use of Clark's refusal was harmless beyond a reasonable doubt. *See State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993). Significantly, the jury could not return a verdict on the parallel charge that Clark had a BAC of .08 or more within two hours of driving. At minimum, this suggests that some jurors harbored misgivings about the reliability of the blood-draw evidence. Apart from such evidence, the state's case depended on testimony that Clark performed poorly on field sobriety tests. Such tests are circumstantial evidence of guilt, and each of those tests may be subject to innocent explanations such as those provided by Clark's defense counsel during the trial. In that context, the state's claim that Clark's refusal indicated cognizance of guilt may well have been pivotal.

¶31 For this reason, we cannot avoid reaching the constitutional issue. Arizona courts have prohibited the state's use of a defendant's assertion of his Fourth Amendment rights as direct evidence of guilt. They have done so on the logical grounds that (1) the state is not entitled to presume a defendant's refusal is motivated by consciousness of guilt rather than by a desire to prevent a warrantless governmental intrusion on his privacy, and the evidentiary value of a refusal is therefore questionable; and (2) the state should not be allowed to penalize and thereby chill the exercise of rights guaranteed by the United States Constitution. I dissent from this court's judgment and would vacate Clark's conviction and sentence and remand the case for further proceedings.